

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DENNIS TALLMAN, et al.,

Plaintiffs,

v.

CPS SECURITY (USA), INC. and CPS  
CONSTRUCTION SECURITY PLUS,  
INC.,

Defendants.

2:09-CV-00944-PMP-PAL

ORDER

Before the Court is Defendants' Motion in Limine to Admit the Final Fact Findings of Assistant District Director of the U.S. Department of Labor Charles Striegel (Doc. #124), filed on April 9, 2012. Plaintiffs filed an Opposition (Doc. #131) on April 23, 2012. The Court held a hearing on this Motion on October 15, 2012. (Mins of Proceedings (Doc. #174).) The Court held another hearing on the Motion on December 6, 2012. (Mins. of Proceedings (Doc. #195).) Defendants thereafter filed a Supplement (Doc. #197), and Plaintiffs filed a Motion to Strike the Supplement (Doc. #198).

Defendants move to admit a letter from the Assistant District Director of the U.S. Department of Labor, Charles Striegel (the "Striegel letter"). Defendants argue the Striegel letter is admissible under Federal Rule of Evidence 803(8) and is relevant to their safe harbor defense and willfulness, which in turn is relevant to the statute of limitations and liquidated damages. Plaintiffs oppose, arguing a letter obtained in 1997 regarding Defendants' different practices related to trailer guards in California is not relevant to Defendants' more recent, different policies related to Nevada trailer guards. Plaintiffs

1 further argue that even if relevant, the letter would confuse the jury regarding whether the  
2 letter approved Defendants' policies with respect to Nevada trailer guards, when it did not.

3 Under Federal Rule of Evidence 401, the Striegel letter is relevant to two topics.  
4 First, as Defendants argued in their motion, it is relevant to willfulness. Second, as  
5 Defendants argued at the December 6 hearing in this matter, it is relevant to Defendants'  
6 safe harbor defense under 29 U.S.C. § 259(a). The Striegel letter's probative value is not  
7 substantially outweighed by the danger of unfair prejudice. See Fed. R. Ev. 403. Because  
8 the arguments Plaintiffs raise with respect to the Striegel letter can be explored through  
9 cross examination and argued to the jury, the parties' dispute over whether the Striegel  
10 letter offers an opinion on policies which differ from the policies applied to the Nevada  
11 trailer guards will be resolved by the jury.

12 Defendants seek to admit the Striegel letter under the hearsay exception in  
13 Federal Rule of Evidence 803(8). Rule 803(8) provides an exception to the hearsay rule  
14 regardless of whether the declarant is available as a witness for:

15 A record or statement of a public office if:

16 (A) it sets out:

17 (i) the office's activities;

18 (ii) a matter observed while under a legal duty to report,  
19 but not including in a criminal case, a matter observed by  
20 law-enforcement personnel; or

21 (iii) in a civil case or against the government in a  
22 criminal case, factual findings from a legally authorized  
23 investigation; and

24 (B) neither the source of information nor other circumstances  
25 indicate a lack of trustworthiness.

26 Rule 803(8)(A)(i) and (ii) do not apply. The Striegel letter does not set forth his office's  
activities, nor does it set forth Striegel's observations while under a legal duty to report.

The Striegel letter also is not admissible under Rule 803(8)(A)(iii). Striegel's letter is not a  
fact finding resulting from an investigation. Striegel merely opined on whether, if the facts  
were as Defendants described them, those policies would comport with applicable law.

Defendants do not cite any authority for the proposition that an agency opinion letter of this

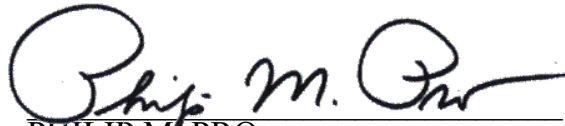
1 sort is admissible under Rule 803(8).

2 Although Rule 803(8) does not apply, Plaintiffs have not objected to the Striegel  
3 letter on hearsay grounds. Defendants do not directly argue the Striegel letter is  
4 nonhearsay, but given the letter's relevance to the issue of Defendants' willfulness and the  
5 safe harbor defense, the Court will admit the Striegel letter as nonhearsay to the extent  
6 Defendants do not offer it to prove the truth of the matter asserted therein (i.e., that  
7 Defendants' policies are compliant with the law). The Court will give a limiting instruction  
8 at the time the Striegel letter is introduced directing that the jury may not consider the  
9 Striegel letter for purposes of whether Defendants' policies in fact comply with the law, but  
10 only for the nonhearsay purpose of the impact, if any, the jury finds it may have had on  
11 Defendants' state of mind or good faith compliance with an agency opinion, and for no  
12 other purpose.

13 IT IS THEREFORE ORDERED that Defendants' Motion in Limine to Admit the  
14 Final Fact Findings of Assistant District Director of the U.S. Department of Labor Charles  
15 Striegel (Doc. #124) is hereby GRANTED as set forth above.

16 IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike (Doc. #198) is  
17 hereby GRANTED.

18  
19 DATED: December 10, 2012

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21 PHILIP M. PRO  
22 United States District Judge  
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